CHEN AI CHOO

v.

NGANG NGUK MOI

HIGH COURT MALAYA, JOHOR BAHRU
KP GENGADHARAN NAIR J
[ORIGINATING SUMMONS NO: MT(3) 24-167-2003]
1 MARCH 2005

FAMILY LAW: *Children - Custody - Plaintiff's application for custody of natural born child in the care of defendant grand aunt - Whether plaintiff an unfit mother - Whether plaintiff's single status a disadvantage - Whether child would benefit from care and affection afforded by plaintiff - Whether child would benefit in company of siblings living with plaintiff - Whether welfare of child overrides agreement for adoption made between plaintiff and defendant*

The plaintiff applied for the custody of her natural born child, a daughter, whom she left in the care of the defendant, her grand aunt. She averred that she handed over the child to the defendant due to financial difficulties and that the defendant offered to care for the child until her financial situation improved. The plaintiff and the child's natural father, a Singaporean citizen, were not married and lived apart. They had two other children who were living with the plaintiff.

The defendant disputed the plaintiff's contention and relied heavily on an alleged agreement made between them that the child was to be handed over to her on a permanent basis for adoption. The defendant also argued for the preservation of the *status quo*.

The facts showed that the plaintiff communicated to the defendant for the return of the child nine months after she handed over the child to the defendant and that that request was met with a firm refusal. Also, the plaintiff engaged solicitors who issued a letter to the defendant demanding the return of the child and when there was no response to that demand, the plaintiff lodged two police reports. She then finally resorted to filing the current proceedings for the return of the child.

Held (granting the plaintiff's application):

(1) There were no compelling factors that pointed to the plaintiff's unfitness to carry out her responsibilities as a caring mother. The fact that she was the natural mother weighed positively in her favour. There was also no evidence to indicate that she had neglected her motherly duties towards her other two children who were living with her. The child, too, would benefit in the company of her siblings if she were to be returned to the plaintiff. Further, she would have better access to her natural father who lived just across the causeway in Singapore. The potential benefits to be gained by these combined factors in the long run outweighed the short-term inconvenience of displacing the child from her present environment to the new one. Further, the child was also a female of tender age who would benefit from the care and affection that would be afforded to her by her natural mother. (para 12)

(2) The weight to be attached to the alleged agreement between the defendant and the plaintiff should be minimal. The overriding consideration was the welfare of the child over and above the terms of such an agreement. At the time of the alleged agreement, the child was of tender age – hardly four years old and the plaintiff was influenced by financial considerations. Therefore, the alleged agreement should not be given effect to. (paras 14 & 15)

(3) The defendant cared for the child quite admirably. There was no evidence to suggest otherwise. However, she was getting on in age and that weighed against her in the long run. The last four years would not have cemented the defendant's relationship with the child to the point that a separation would harm the child. It might take a little time for the child to adjust and establish emotional ties with her parents and siblings but with the passage of time that aspect would naturally be surmounted. (paras 16, 17, 18 & 19)

(4) The plaintiff's single status was not a disadvantage. The defendant, too, was single for that matter. There was no evidence to suggest that the plaintiff lacked the financial ability to raise the child now. She was a working mother who had the aid of a domestic help and that had its advantages. (paras 20 & 21)

Case(s) referred to:
Mahabir Prasad v. Mahabir Prasad [1982] MLJ 189 ***(refd)***

Legislation referred to:
Guardianship of Infants Act 1961, ss. 11, 13

For the plaintiff - M/s Chong & Ragu
For the defendant - M/s Nga Hock Cheh & Co

Reported by Usha Thiagarajah

JUDGMENT

KP Gengadharan Nair J:

[1] By an application *vide* encl. 2 herein the plaintiff applies for custody of her natural born daughter Ang Ying Xuan ("the child") who had been in the custody and care of the defendant, who is her grand aunt, since March 2001.

[2] In her affidavit in support of the application the plaintiff avers that the child was handed over to the defendant when she was four years old as she had been facing financial difficulties at the time and that the defendant had offered to care for the child until such time as the plaintiff's financial situation improved. The plaintiff and the child's natural father who is a Singaporean citizen, are not married and live apart.

[3] The defendant on the other hand disputes the plaintiff's contention and relies heavily on an agreement between the parties that the child was to be handed over on a permanent basis for adoption by the defendant.

[4] I shall deal with this aspect (the agreement) a little later on in this judgment.

[5] It is common ground between the parties that in applications such as this the paramount consideration is the welfare of the child.

[6] The court's jurisdiction in such circumstances is derived from s. 13 of the Guardianship of Infants Act 1961 which deals primarily with the power of the court to return an infant to the custody of his lawful guardian whilst s. 11 of the Act deals with the matters which must be considered by the court in the exercise of its powers.

[7] Section 11 of the Guardianship of Infants Act 61 provides:

> The court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be ...

[8] Returning briefly to the facts of the case it is pertinent to note before going any further, that hardly nine months after the plaintiff had handed over the child to the defendant the plaintiff communicated with the defendant that as her financial situation had somewhat improved she wished to have her daughter back. The request was however met by a firm refusal.

[9] Upon the defendant's refusal, the plaintiff engaged solicitors who issued a letter of 28 November 2001 demanding the return of the child.

[10] There being no response to this demand the plaintiff turned to the police for assistance, lodging two police reports in the process.

[11] She finally resorted to filing these proceedings for the return of the child in January 2003. The defendant then filed an application to have the case transferred to the Ipoh High Court which was dismissed on 22 July 2004.

[12] After allowing for the various affidavits to be filed and after submissions on behalf of both parties were made I decided to hand the child back into custody of the plaintiff, the natural mother as I was of the view that it was in the best interest of the child. My reasons are as follows:

(a) Apart from the agreement referred to earlier, the main thrust of the defendant's argument appears to be for the preservation of the *status quo*. Learned counsel for the defendant also urges the court to consider that it is not in all cases that the natural mother would necessarily be the best option for the child. This is indeed true, but it must be said that in this particular case no evidence was produced by the defendant to demonstrate that there may be factors present that would make the plaintiff unfit in her role as a mother. This would be a vital factor to consider in the circumstances of this case. In the absence, therefore, of any compelling

factors that may point to the plaintiff's unfitness to carry out her responsibilities as a caring mother, the fact that she is the natural mother, in my view, weighs positively in her favour. There is no evidence also to indicate that she has in any way been derelict in her motherly duties towards her other two children who live with her. There is also another factor in favour of the child being returned to live with her another and that is that the child would have the benefit of the company of her siblings and will be raised in the long run together under one roof.

(b) Another factor I consider pertinent is the fact that the child will have better access to her natural father who lives just a cross the causeway in Singapore. She will be able to conveniently accompany her other siblings on their visits to see their father. The potential benefits to be gained by these combined factors in the long run would in my view surely outweigh the short term inconvenience of displacing the child from her present environment to the new one. I am mindful that the present *status quo* would be upset by the move. The Federal Court in *Mahabir Prasad v. Mahabir Prasad* [1982] MLJ 189, in affirming the trial judge's decision to return the children there to their natural mother to live in India with her and thereby, on the face of it upsetting the *status quo* in the process, had this to say:

> It is true that this *status quo* was established by the father when the mother left for India in January 1980. The learned judge saw no virtue in preserving the *status quo*. In short the learned Judge has given the overriding consideration of the welfare of the children uppermost in his mind. That we think is the correct approach.

The court in *Mahabir Prasad*'s case further considered the fact that of the two parents, the mother lives in a family situation and has established a close relationship with the children – "She is also their mother and prepares to devote a very long and continuous period to the care of the children. This demonstrate a willingness to face up to the responsibilities of parenthood". I am fortified in my views in this case by the views expressed in *Mahabir Prasad*'s case.

A (c) The plaintiff also largely lives in a family situation and this family situation would be further enhanced and established when the child comes to live with them and has increased accessibility to their father across the causeway. In the long run therefore this family situation will, no doubt, augur well for
B the future upbringing and welfare of the child.

(d) I also took into consideration the fact that the child is a female of tender age and would benefit from the care and affection that will be afforded to her by her natural mother.

C **[13]** I now turn very briefly to the alleged agreement or arrangement the defendant is relying upon.

[14] In my view the weight to be attached to such agreements should be minimal. The court cannot give too much credence to
D such agreements as the overriding consideration is the welfare of the child which would necessarily mean over and above the terms of such agreements. At the time of the alleged agreement the child was of tender age – hardly four years old. The plaintiff at that point in time was influenced by financial considerations at the
E material time.

[15] For these reasons therefore I am not prepared to give any effect to such alleged agreement even if there was one.

F **[16]** In passing, it must be said that the defendant (grand aunt) has so for cared for the child quite admirably and there is no evidence to suggest otherwise.

[17] However what I have to obviously consider is the future upbringing of the child in the long run.

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[18] The defendant is getting on in age and this weighs against her in the long run.

[19] I do not think that the last four (4) years has cemented the
H defendant's relationship with the child to the point that a separation will harm the child. It may take a little time for the child to adjust and establish fresh emotional ties but I am confident that with the passage of time even this aspect will be naturally surmounted eventually.

I

[20] I do not think that the plaintiff's single status is a disadvantage as suggested by the defence. In fact the defendant is also single for that matter.

[21] There is also no evidence to suggest that the plaintiff lacks the financial ability to raise the child. She is a working mother who has the aid of a domestic help which in this day and age has its advantages.

[22] Taking, therefore, all these factors into consideration, with the welfare of the child in the long run uppermost in my mind, I therefore grant and order in terms of prayers 1, 2 (to be amended to be read as "dalam tempoh empat belas (14) hari dari ...) and 3 of encl. 2.